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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

KRISTA WILSEY, Individually and as Special Administrator of the Estate of LACEY M. HAMMEL, Deceased Minor,
Petitioner,

vs.

CHARLES F. EDDINGFIELD, M.D., EDWARD MCKENNEY, D.O., and VASANT F. PAWAR, M.D.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ISSUES PRESENTED FOR REVIEW

1. Whether the Seventh Circuit properly ruled that the district court must consider the residence of each beneficiary of an action under the Illinois Wrongful Death Act in determining whether complete diversity of jurisdiction exists in such an action.

2. Whether a United States federal court sitting in Illinois may properly refuse to appoint a nonresident special administrator in a wrongful death action in which the deceased minor was an Illinois resident prior to and at the time of her death.

3. Whether the trial court erred in allowing the petitioner to file her notice of appeal to the U.S. Court of Appeals for the Seventh Circuit on July 11, 1984 from an order of the court entered on May 11, 1984.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Edward McKenney, D.O., and Vasant F. Pawar, M.D., respondents herein, oppose petitioner's prayer that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on December 16, 1985 and file this brief in support thereof pursuant to Title 28 U.S.C., Supreme Court Rules, Rule 22.

JURISDICTION

This Court is asked to exercise its discretion and review the decision rendered in the United States Court of Appeals, Seventh Circuit, reported at ____ F.2d ____ and reproduced in petitioner's appendix, by granting a writ of certiorari pursuant to 28 U.S.C. §1254(1).

APPLICABLE STATUTES

The texts of the applicable statutes are set forth in the appendix to this brief.

STATEMENT OF THE CASE

Respondents agree that petitioner's statement of the case is essentially accurate. We do wish to offer clarification.

As noted in the April 17, 1985 opinion of the Seventh Circuit, Krista Wilsey, initiated this action under 28 U.S.C. §1332(a)(1), by filing two pleadings in the federal district court. In one pleading, she asked the district court to name her special administrator of the estate of her deceased child, Lacey Hammel. In the second pleading, she sought recovery against all defendants under the Illinois Wrongful Death Act in the capacity of special administrator of the estate of Lacey Hammel.

Respondents moved to dismiss challenging the jurisdiction of the district court. The respondents raised two points. First, respondents contended that the district court did not have jurisdiction over an Illinois probate matter and could not appoint an administrator of an Illinois estate. Secondly, respondents contended that the court could not appoint an Iowa resident as the special administrator of an Illinois estate. In this, respondents relied upon the Illinos Probate Act which requires that an administrator of an Illinois estate must be an Illinois resident.

Contrary to Ms. Wilsey's assertion, the district court did not name her special administrator of the estate of Lacey Hammel. In fact, the district court denied Wilsey's petition, finding that an Iowa resident may not be appointed special administrator under the Illinois Wrongful Death Act (appendix to petition, A-20). Therefore, since she has not been so appointed, Ms. Wilsey's claim that she is the special administrator is simply inaccurate. Quoting the trial court: "...The court finds that,

under the facts of this case, Ms. Wilsey, as an Iowa resident, may not be appointed special administrator in this case. Therefore her petition to be appointed special administrator must be DENIED." (appendix to petition, A-20) (emphasis in original)

Thereafter, Jeffrey R. Hammel, father of Lacey Hammel, secured appointment of himself as special administrator of the estate of the deceased child and filed a wrongful death action against these respondents.[1] Jeffrey Hammel filed his petition seeking appointment and his complaint in the State Court of Illinois, Hancock County.

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[1] The August 17, 1984 order of the circuit court appears in the appendix.

REASONS FOR DENYING A WRIT OF CERTIORARI

Summary of Argument

This Court should deny Krista Wilsey's petition for writ of certiorari. The seventh circuit's decision here is consistent with *Bear v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30 (7th Cir. 1979) and this Court's opinion in *Navarro Savings Association v. Lee*, 446 U.S. 458, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980). It is also consistent with the approach of the other federal circuits that have considered this problem.

Denial of the petition is warranted because Krista Wilsey is not the special administrator of the estate of Lacey Hammel and cannot be so named under Illinois law. Although she boldly asserts that she is the special administrator of her daughter's estate pursuant to the Illinois Wrongful Death Act[2], her petition for appointment was denied by the trial court and that decision was not disturbed by the Seventh Circuit (appendix to petition, A-20, A-8). Furthermore, she cannot be so appointed because the special administrator, under Illinois law, must be a resident of Illinois.

Finally, this Court should deny her petition on the basis that petitioner failed to timely file her notice of appeal to the U. S. Court of Appeals for the Seventh Circuit.

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[2] The text of the Illinois Wrongful Death Act, Ill.Rev.Stat., Ch. 70, §§2 and 2.1 is set forth in the appendix herein.

ARGUMENT

I. The U. S. Court Of Appeals For The Seventh Circuit Is In Accord With This Court And Its Sister Circuits In Its Application Of Federal Law On The Issue Of Whether The Beneficiaries Of A Wrongful Death Action Are The Real Parties In Interest For Purposes Of Diversity Jurisdiction.

Petitioner attempted to assert diversity jurisdiction through the appointment of a nonresident special administrator. Under Illinois law, it is procedurally correct to bring the action in the name of the special administrator. However, the substantive law of Illinois identifies the beneficiaries of the estate as the real parties in interest. It is undisputed that, for procedural purposes, the real party in interest under Federal Rule of Civil Procedure 17(a) is the personal representative of the deceased.

Article III, §2 of the United States Constitution and 28 U.S.C. §1332(a)(1) vests federal courts with jurisdiction over controversies between "citizens of different states." Although neither the statute[3] nor the constitution require all the parties on one side be citizens of the same state, the plaintiffs and the defendants must be diverse to one another. This rule of "complete diversity" was first recognized by Chief Justice Marshall in *Strawbridge v. Curtiss,* 3 Cranch 267, 2 L.Ed. 435 (1806).

In determining whether complete diversity exists, nominal or formal parties should be ignored and only real and substantial parties to the controversy should be considered. *Carneal v. Banks,* 10 Wheat. 181, 6 L.Ed. 297 (1825); *Salem Trust Company v. Manufacturers' Finance Company,* 264 U.S. 182, 44 S.Ct. 266, 68 L.Ed. 628 (1924); *Navarro Savings Association v. Lee,* 446 U.S. 458, 460, 64 L.Ed.2d 425, 429, 100 S.Ct. 1779 (1980). Thus, as recently stated by this court, "...a federal

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[3] 28 U.S.C. §1332(a)(1)

court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy." *Navarro Savings Association v. Lee,* 446 U.S. 458, 460.

Consequently, the determination of real party in interest for procedural purposes and substantive purposes will not always yield the same result. Quoting this Court, "There is a rough symmetry between the real party in interest standard of Rule 17(a) and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversy. But the two rules serve different purposes and need not produce identical outcomes in all cases." *Navarro Savings Association v. Lee,* 446 U.S. 458, 462, F.9. Rule 17(a) is procedural only and does not extend or limit the jurisdiction of the United States District Courts. See: Fed. Rule Civ. Proc. 82. Its only purpose is to identify the proper party in whose name an action is to be brought.

Under Illinois law the special administrator is a nominal party. The Illinois Wrongful Death Act does not give the special administrator the right to share in the recovery. The representative's *sole duty* under the Act is to prosecute the action and distribute the proceeds to the statutory beneficiaries in the event of recovery. See Ill.Rev.Stat., Ch. 70 §§2, 2.1; *Betar v. DeHavilland Aircraft of Canada, Ltd.,* 603 F.2d 30, 35 (7th Cir. 1979). (emphasis added).

As early as 1857 the Illinois Supreme Court recognized the very limited role of the personal representative under the Wrongful Death Act. The personal representative brings the action not for his or her own benefit, nor in the right of the estate. Rather, the representative is only the fiduciary for those who had a more or less direct pecuniary interest in the continuance of the life of the deceased. *City of Chicago v. Major,* 18 Ill. 349, 358 (Ill.S.Ct. 1857). "The history of the Illinois Wrongful Death Act demonstrates that although the action is to be brought by and in the name of the personal representatives of

such deceased person, the legislative intent is that those claims are those of the individual beneficiaries." *Wilbon v. D. F. Bast Company, Inc.*, 73 Ill.2d 58, 382 N.E.2d 784, 788 (1978).

Section 2 of the Illinois Wrongful Death Act does not create an individual right for a plaintiff bringing suit. Rather, it affords a cause of action for the statutory beneficiaries, who are the real parties in interest. Ill.Rev.Stat., Ch. 70, par. 2; See *Van Mehr v. Goldfarb,* 317 Ill. 620, 622, 148 N.E.2d 391 (Ill.S.Ct. 1925). Illinois courts have determined that a special administrator under the Wrongful Death Act is only a formal party having no interest whatsoever. He/she acts merely as the legal agent of the beneficiaries under the Act. *Voorhees v. Chicago & Alton Railway Company,* 208 Ill.App. 86 (3d Dist. 1917).

Although the special administrator brings the action in his or her name and controls the course of the proceedings, the statutory beneficiaries would still have the right to settle the action and release all claims against the defendants in a wrongful death action. As the special administrator is but the agent of the beneficiary, his control over the suit is not exclusive. See *Strong v. Hodges,* 344 Ill.App. 306, 100 N.E.2d 666 (2d Dist. 1951). It could therefore be inferred that in the event the special administrator was not diligent in his or her pursuit of the claim, the statutory beneficiaries could petition the court to have that special administrator removed and replaced by someone who would diligently protect their interests.

In light of this Illinois precedent, the Seventh Circuit correctly determined that the personal representative is but a nominal party to the lawsuit. (App. 8) See: *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30, 35; *Matter of Field's Estate,* 588 S.W.2d 50 (Mo.App. 1979) (construing Illinois law). The representative's duty under the Act is to prosecute the action and distribute the proceeds to the statutory beneficiaries in the event of recovery. *Betar v. DeHavilland Aircraft of Canada,*

Ltd., 603 F.2d 30, 35. The special administrator lacks a "stake in the outcome" and the statutory beneficiaries are the only real parties in interest for purposes of diversity; "they are the only parties that have an actual stake in the outcome of the litigation." (appendix to petition, A-10).

Because this Court's ruling in *Navarro Savings Association v. Lee*, 446 U.S. 458, determined that the trustee in that case was a real party to the controversy, the petitioner asserts that it is contrary to the Seventh Circuit's pronouncement in this case and in *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30. But in *Navarro*, the trustees, by reason of the declaration of trust, were given "exclusive authority over [the] property free from any power and control of the shareholders, to the same extent as if the trustees were the sole owners of the trust estate in their own right. . . ." 446 U.S. 458, 459. There, the respondents had the power to transact the business of the trust beneficiaries, execute documents, and sue and be sued in the name of the trust or in the names of the trustees of the trust, as well as, invest the funds of the trust, lend money from the trust, and initiate or compromise lawsuits relating to the trust's affairs, all to the exclusion of the trust beneficiaries. 446 U.S. 458, 459. Thus, their interests were deemed real and substantial and this was decisive in this court's determination.

In contrast to the business trustees in *Navarro*, the powers of the special administrator under the Illinois Wrongful Death Act are very narrow. The role of the special administrator is limited to a single function. The special administrator is appointed pursuant to statute for the sole purpose of initiating a wrongful death action and distributing any procceds to the statutory beneficiaries that may be recovered from that litigation. Ill.Rev.Stat., Ch. 70, §2.1. Of course, the personal representative has a fiduciary duty requiring a bond to insure with diligence and fidelity. Performance of this fiduciary duty of diligence is hardly a sufficient stake in the action to make the representative the real party to the controversy. *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30, 35.

Although the role of the special administrator in bringing a wrongful death action under Illinois law has been properly construed and applied by the Seventh Circuit, petitioner insists that the Seventh Circuit ruling is in conflict with its sister circuits. Petitioner points to various authorities which purport to support her position.[4] In this, petitioner is incorrect.

From a reading of the decisions cited by petitioner, it is apparent that no conflict exists. It is only the results of litigation that differ due to the facts and widely varying circumstances of each case.

Petitioner's attempt to manufacture a conflict among the circuits is unsuccessful. First, all of the cases she cites in her petition address the question of whether a particular administrator or trustee was improperly or collusively appointed for the purpose of creating diversity, in violation of 28 U.S.C. §1359. *Janzen v. Gooz,* 302 F.2d 421 (8th Cir. 1962); *McSparran v. Weist,* 402 F.2d 867 (3d Cir. 1968) (en banc), *cert. denied,* 395 U.S. 903, 89 S.Ct. 1739, 23 L.Ed.2d 217 (1969); *Bianca v. Parke-Davis Pharmaceutical Division,* 723 F.2d 392 (5th Cir. 1984); *Groh v. Brooks,* 421 F.2d 589 (3d Cir. 1970); *Gross v. Hougland,* 712 F.2d 1034 (6th Cir. 1983). Without question, "a nominal party designated simply for the purpose of creating diversity of citizenship, who has no real or substantial interest in the dispute or controversy, is improperly or collusively named." *McSparran v. Weist,* 402 F.2d 867, 873 (3d Cir. 1968; see also *Navarro Savings Association v. Lee,* 446 U.S. 458. As Ms. Wilsey has never been appointed special administrator that question is not properly at issue in this case.

Petitioner persists that this Court should hear this case in order to resolve a purported conflict between the Seventh Circuit's ruling in *Betar v. DeHavilland Aircraft of Canada, Ltd.* and the other circuits. However, petitioner's position is flawed

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[4] See petitioner's petition for writ of certiorari, p. 5, Ft. 3.

when the distinguishing facts in many of her cited cases are reviewed. The principles established in the Eighth, Third, Fifth and Sixth Circuits and with this Court in *Navarro Savings Association,* 446 U.S. 458, are embodied in the Seventh Circuit's decisions in this case and *Betar.*

Petitioner relies on the Tenth Circuit decision in *Hackney v. Newman Memorial Hospital,* 621 F.2d 1069, 67 A.L.R.F. 456 (10th Cir. 1980), *cert. denied,* 449 U.S. 982 (1980). But unlike this case and the *Betar* decision, *Hackney* was construing the role of the special administrator as defined by the law in Oklahoma. "Under Oklahoma law, the administrator, to whom the cause of action belongs, has full authority to conduct the litigations; the beneficiaries have no right to settle, control or otherwise dispose of the action." (emphasis added) (Appendix to petitioner's brief, A-12) Moreover, Oklahoma law permits the special administrator under the Oklahoma Wrongful Death Act to be a nonresident fiduciary.

In Illinois, not only does the cause of action belong to the beneficiaries, but the special administrator must be a resident of Illinois. Additionally, in contrast to the Oklahoma construction of their wrongful death statute, Illinois deems the special administrator to be merely a nominal party as the discussion above has made clear.

As with *Hackney,* petitioner's additional authority is not persuasive on the point she asserts. In *O'Brien v. Stover,* 443 F.2d 1013 (8th Cir. 1971), the nonresident fiduciary was the "sole heir'. Consequently, diversity jurisdiction was appropriate.

In *Bettin v. Nelson,* 744 F.2d 53 (8th Cir. 1984), state law permitted the decedent's out of state parents to be appointed as special administrators. But Illinois requires the administrator to be an Illinois resident and here, the only special administrator to have been appointed is the decedent's father, an Illinois resident. In spite of her selfproclaimed status, Krista Wilsey has never been appointed nor recognized by a court of law as the special administrator of the decedent.

In *Gross v. Hougland,* 712 F.2d 1034 (6th Cir. 1983), a receiver was appointed under Del.Ch.R. 150 to bring an action on behalf of a dissolved corporation against the majority shareholders for negligence in liquidating the corporate assets. The receiver, a Delaware citizen, alleged diversity of citizenship on the basis that he was diverse to the named defendants, citizens of Kentucky. The defendants objected, but the court of appeals ruled that diversity of citizenship was bona fide because under Delaware law the receiver had to be a citizen of that state and was designated as the real party in interest. In Illinois the special administrator must be an Illinois resident, which Krista Wilsey is not, and he/she is deemed to be only a nominal party to the litigation.

In *Field v. Volkswagenwerk, A.G.,* 626 F.2d 293 (3d Cir. 1980), under New York law the only person who could be named was Ivana Field, the decedent's husband. Ivana was a citizen of Czechoslovakia and the defendant was a citizen of West Germany. The court there refused access to the federal courts since jurisdiction over suits between aliens has been consistently denied. 626 F.2d at 296, citing 13 *C. Wright, A. Miller & Cooper,* Federal Practice and Procedure, Section 3604, at 607-08 (1975) and cases cited thereunder.

Thus, the federal circuit courts are consistent among themselves and with this Court's decision in *Navarro Savings v. Lee,* 446 U.S. 458. Moreover, the Seventh Circuit is properly construing and applying the law of Illinois as it pertains to the status of the special administrator under the Illinois Wrongful Death Act, concluding that the special administrator is but a nominal or formal party to the lawsuit and the real and substantial parties to the controversy are the statutory beneficiaries.

Finally, the ruling of the Seventh Circuit in *Betar* and this case provides a clear test which is easy to apply and assures that cases which are wholly local in nature remain in the Illinois state courts. If allowed, petitioner's position would open the flood

gates to the federal courts. It would permit any action under the Illinois Wrongful Death Act to be brought in a U. S. district court simply by naming an out of state administrator.

II. A Federal District Court Sitting In Illinois May Properly Refuse To Appoint A Non-Resident Administrator In A Wrongful Death Action In Which The Deceased Minor Was An Illinois Resident Prior To And At The Time Of Her Death.

Even if this Court determined that a special administrator under the Illinois Wrongful Death Act was a real party to the controversy for purposes of determining diversity of citizenship, this Court should deny petitioner's petition for writ of certiorari on the basis that the district court properly refused to appoint petitioner herein, as a non-resident administrator in a wrongful death action in which the deceased minor was an Illinois resident prior to and at the time of her death. Without appointment of petitioner, an out of state resident, there is no diversity.

In its denial of petitioner's petition to be appointed special administrator, the court reasoned that, "because of the relationship and reference to the Probate Act in the Wrongful Death Act, the necessity for an in-state administrator is present." (Appendix to petitioner's brief, A-19) Additionally, the court indicated a concern that distribution to a minor, as is involved here, could not be properly supervised by the probate division of the court if the special administrator were not a resident of Illinois. (Appendix to petition, A-20).

In her brief to the Seventh Circuit, petitioner advocated the position that there are no requirements whatsoever which must be met prior to the appointment of a special administrator. The application of common sense, however, suggests a different result. If this Court were to accept the position which the peti-

tioner advocates, it would mean that a minor, an incompetent, or a resident of a foreign country could properly be appointed a special administrator under §2.1 of the Wrongful Death Act. Clearly, this cannot be an intended or a desired result. If the Wrongful Death Act and Probate Act are read together such nonsensical results are avoided.

Under the Probate Act an administrator must be at least 18 years of age, a resident of Illinois, of sound mind, not adjudged a disabled person, and not convicted of an infamous crime (Ill.Rev.Stat., Ch. 110½, par. 9-1).

Illinois case law supports the conclusion that the statutes must be read together. In *In Re Estate of Faught,* 111 Ill.App.3d 1043, 1045, 445 N.E.2d 54 (1983), a conflict had arisen between an administrator to collect or special administrator appointed under the Wrongful Death Act and an executor appointed subsequent to the special administrator. Section 2.1 of the Wrongful Death Act was silent as to the resolution of this conflict. The appellate court held that even though the special administrator had been properly appointed under the Wrongful Death Act the appointment of the executor under the Probate Code properly resulted in the revocation of the appointment of the special administrator. In reaching its decision, the court noted that nothing in §2.1 of the Wrongful Death Act serves to abrogate the provisions of the Probate Act.

Faught merely recognizes the inherent relationship between the Wrongful Death Act and the Probate Act. Moreover, based on the particular facts in the instant case, Judge Mihm expressed understandable concern that the person appointed special administrator be subject to the jurisdiction of the Illinois courts where, as here, the proceeds could be distributable to a minor.

The obvious purpose of §2.1, which was added to the Wrongful Death Act effective October 1, 1977, is to facilitate the filing of a wrongful death action by a special administrator in a case where the only asset of the deceased's estate is a cause

of action arising under the Act by obviating the requirement of opening an estate. However, the defendants would not agree with petitioner that the elimination of the requirement of opening an estate necessitates that §2.1 was intended to do away with all requirements as to the appointment of a special administrator. The mere application of minimum requirements to the appointment of a special administrator in no way reduces the ease with which a wrongful death action may be initiated. Rather, the application of minimum requirements merely insures that the person appointed is competent to serve as administrator thus facilitating the distribution of the proceeds at the conclusion of the action.

It is more reasonable and logical to assume that, consistent with other statutory references to the Probate Act found in the Wrongful Death Act, the legislature intended that the mental, moral, age and residency requirements apply to the appointment of a special administrator.

Because both common sense and Illinois case law support the decision of the trial court, the trial court's ruling that a federal district court sitting in Illinois may properly refuse to appoint a non-resident administrator in wrongful death action where the deceased minor was an Illinois resident prior to and at the time of death was proper.

III. Failure To File Within The Time Prescriptions Precludes Pursuit Of An Appeal.

Rule 4(a)(1) of the Rules of Appellate Procedure states that the notice of appeal "*shall* be filed with the clerk of the District Court within 30 days after the date of entry of judgment or order appealed therefrom." (emphasis added) This 30 day time limit is mandatory and jurisdictional. *Browder v. Director, Illinois Department of Corrections,* 434 U.S. 257, 54 L.Ed.2d 521, 98 S.Ct. 556 (1978); *Selph v. Council of the City of Los Angeles,* 593 F.2d 882 (9th Cir. 1979). Consequently, where a

party fails to file a timely notice of appeal, the appellate court has no jurisdiction over the case. *Sooner Products Company v. McBride,* 708 F.2d 510 (10th Cir. 1983); *Gooch v. Skelly Oil Company,* 493 F.2d 366 (10th Cir. 1974).

Two narrow exceptions to the requirement of timely notice have been incorporated into the rule. In order to file a notice of appeal after the expiration of the 30 day time period, the party requesting the extension must show excusable neglect or good cause for failure to file in a timely fashion. Federal Rule of Appellate Procedure 4(a)(5).

The good cause exception is clearly inapplicable to the present situation. That exception merely codified preexisting case law allowing an extension of time under circumstances where the term "excusable neglect" was a misnomer. This exception applies only to requests for extension of time where the 30 day time limit has not expired. *State of Oregon v. Champion International Corporation,* 680 F.2d 1300 (9th Cir. 1982). Since petitioner's request was filed more than 30 days after the entry of the order, the only available exception is excusable neglect.

The standard for determining excusable neglect is a strict one. *Feeder Line Towing Service, Inc. v. Toledo, Peoria & Western Railroad Company,* 539 F.2d 1109 (7th Cir. 1976); *Selph v. Council of the City of Los Angeles,* 593 F.2d 882; *State of Oregon v. Champion International Corporation,* 680 F.2d 1300. The burden rests on the party requesting the extension to make a clear showing that the circumstances of the case are unique or extraordinary and the neglect was excusable. *Birl v. Estelle,* 660 F.2d 592 (5th Cir. 1981); *Fase v. Seafarers Welfare & Pension Plan,* 574 F.2d 72 (2d Cir. 1978); *Spound v. Mohasco Industries, Inc.,* 534 F.2d 404 (1st Dir. 1976).

The historical development of Rule 4(a) clearly indicates that strict adherences to the time limit is intended and enforcement of those time limits may be relaxed only under the most exceptional circumstances.

The intention that the excusable neglect exception continue to be strictly construed is likewise evidenced by the committee note to the 1966 amendment where it states:

> "*In view of the ease with which an appeal may be perfected,* no reason other than failure to learn of the entry of judgment should ordinarily excuse a party from the requirement that the notice be timely filed. But the district court should have authority to permit the notice to be filed out of time in *extraordinary cases* where injustice would otherwise result. (emphasis added). *Files v. City of Rockford,* 440 F.2d 811, 814 (7th Cir. 1971).

The courts have strictly adhered to the stringent standard of excusable neglect. It has been held that the excusable neglect standard is not met by claims of confusion, mistake of law or misunderstanding by counsel. *In Re Buckingham Supermarkets, Inc.*, 631 F.2d 763, 766 (D.C. Cir. 1980). Likewise, inadvertence or mere palpable mistake by counsel fails to rise to the level of excusable neglect. *Chipser v. Kohlmeyer & Company,* 600 F.2d 1061, 1063 (5th Cir. 1979); *Spound v. Mohasco Industries, Inc.*, 534 F.2d 404, 411 (1st Cir. 1976).

In the Seventh Circuit, petitioner made an equivocal argument that mistake or misconception of the law applies to this case. On one hand she cited *Feeder Line Tow Service v. Toledo,* 539 F.2d 1107 (7th Cir. 1976) for the proposition that legal misconception may amount to excusable neglect. In *Feeder,* the misconception was occasioned by two directly conflicting statutes. In addition to the factual disparity between *Feeder Line* and the present case, petitioner's counsel has never admitted that in fact she misperceived the applicable law on the statute of limitations. In her factual summary, she clearly stated that only a "strained" interpretation of Judge Mihm's order could interfere with her state action. The trial court in Hancock County has, in turn, acceded to petitioner's argument.

Regardless, petitioner's actions are clearly outside the sphere of excusable neglect. Her decision to abandon her federal court appeal and proceed in the state court was a tactical decision. Petitioner renewed her pursuit of the federal action when she was dissatisfied with the progress of the state court action. A tactical decision is not tantamount to excusable neglect. *Linabary v. Maritime Overseas Corporation,* 376 F.Supp. 688 (S.D.N.Y. 1977).

On May 11, 1984, petitioner's attorney knew that a final and appealable order had been entered, and that the time for appeal was running. On June 14, 1984, her state court action was attacked by defendant's motion to dismiss. Therefore, she filed a motion for extension of time to appeal. Petitioner cannot now change her tactics and pursue her federal action, in conjunction with her state action, under the guise of excusable neglect. In her brief, petitioner stated that her "original desire" was to refile the action in state court rather than to appeal the federal court decision "to avoid delay and expense". (Brief in the Seventh Circuit of plaintiff-appellant, cross-appellee p. 7) Further evidence that petitioner's decision was tactical, is the fact that her counsel could have filed a notice of appeal and, if subsequently it was ascertained that any appeal should not be pursued, the appeal could have been dismissed. However, she chose to forego her appeal.

Petitioner portrays the standard of abuse of discretion as an impenetrable barrier. However, this standard has hardly been impervious to review. Consistently, the appellate courts have scrutinized the trial court's finding of excusable neglect. In many instances, the trial court's decision to extend the time limits has been overturned. E.g. *Sprout v. Farmers Insurance Exchange,* 681 F.2d 587 (9th Cir. 1982); *Pellingrino v. Marathon Bank,* 640 F.2d 696 (5th Cir. 1981); *Gooch v. Skelly Oil Company,* 493 F.2d 366 (10th Cir. 1974); *Files v. City of Rockford,* 440 F.2d 811 (7th Cir. 1971).

Where, as here, there is no excuse for the late filing of a notice of appeal, it is an abuse of discretion for a district court to grant an extension of time. *Sprout v. Farmers Insurance,* 681 F.2d at 588 (9th Cir. 1982).

The basic rationale for insistence upon timely filing is the necessity for providing a precisely ascertainable point of time at which litigation comes to an end. *Files v. The City of Rockford,* 440 F.2d 811 (7th Cir. 1971). It is imperative that the provisions of Rule 4(a) be enforced to assure finality of judgments and to maintain order in the judicial process. Federal Rule of Appellate Procedure 4(a) must be construed to protect this value. *Selph v. Council of the City of Los Angeles,* 593 F.2d 881, 882 (9th Cir. 1979).

The petitioner's late notice of appeal should be dismissed as untimely. Dissatisfaction with the status of a collateral proceeding has never constituted excusable neglect. Petitioner's efforts to change her tactics in asserting her claim clearly fail to meet the standard of excusable neglect. Under the circumstances, this Court should deny the issuance of a writ of certiorari in this cause.

CONCLUSION

From the foregoing analysis, it is clear that this Court should not issue a writ of certiorari in this case. The petitioner is not the special administrator of the decedent's estate and the district court properly concluded that she could not be so named under Illinois law. Moreover, Illinois law does not grant her the privilege of suing in her individual capacity. Even if she was the statutory representative of the deceased's estate, the Seventh Circuit properly identified her as but a nominal party to the litigation which precluded her citizenship from controlling for purposes of diversity. Absent complete diversity of citizenship, the district court properly ruled that the wrongful death action filed by Krista Wilsey should be dismissed and the controversy should be heard in its proper forum, the State of Illinois.

Further, the petitioner failed to file her notice of appeal within the applicable time limits. Since she failed to sustain her burden to show good cause or excusable neglect, no extension of time should be granted and her petition should be summarily denied.

Respectfully submitted,

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APPENDIX

APPENDIX

70 Ill.Rev.Stat. §2

"Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the surviving spouse and next of kin of such deceased person.

"In every such action, the jury shall determine the amount of damages to be recovered without regard to and with no special instruction as to the dollar limits on recovery imposed by this Section. In no event shall the judgment entered uon such verdict exceed $20,000 where such death occurred prior to July 14, 1955, and not exceeding $25,000 where such death occurred on or after July 14, 1955 and prior to July 8, 1957, and not exceeding $30,000 where such death occurs on or after July 8, 1957 and prior to the effective date of this amendatory Act of 1967, and without limitation where such death occurs on or after the effective date of this amendatory Act of 1967.

"The amount recovered in any such action shall be distributed by the court in which the cause is heard or, in the case of an agreed settlement, by the circuit court, to each of the surviving spouse and next of kin of such deceased person in the proportion, as determined by the court, that the percentage of dependency of each such person upon the deceased person bears to the sum of the percentages of dependency of all such persons upon the deceased person.

"Where the deceased person left no surviving spouse or next of kin entitled to recovery, the damages shall, subject to the following limitations inure, to the exclusive benefit of the following persons, or any one or more of them:

(a) to the person or persons furnishing hospitalization or hospital services in connection with the last illness or injury of the deceased person, not exceeding $450;

(b) to the person or persons furnishing medical or surgical services in connection with such last illness or injury, not exceeding $450;

(c) to the personal representatives, as such, for the costs and expenses of administering the estate and prosecuting or compromising the action, including a reasonable attorney's fee. In any such case the measure of damages to be recovered shall be the total of the reasonable value of such hospitalization or hospital service, medical and surgical services, funeral expenses, and such costs and expenses of administration, including attorney fees, not exceeding the foregoing limitations for each class of such expenses and not exceeding $900 plus a reasonable attorney's fee.

"Every such action shall be commenced within 2 years after the death of such person but an action against a defendant arising from a crime committed by the defendant in whose name an escrow account was established under the 'Criminal Victims; Escrow Account Act' shall be commenced within 2 years after the establishment of such account. For the purposes of this Section 2, next of kin includes an adopting parent and an adopted child, and they shall be treated as a natural parent and a natural child, respectively. However, if a person entitled to recover benefits under this Act, is, at the time the cause of action accrued, within the age of 18 years, he or she may cause such action to be brought within 2 years after attainment of the age of 18.

"In any such action to recover damages where the wrongful act, neglect or default causing the death occurred on or after July 14, 1955, it shall not be a defense that the death was caused in whole or in part by the contributory negligence of one or more of the beneficiaries on behalf of whom the action is brought, but the amount of damages given shall not include any compensation with reference to the pecuniary injuries resulting from such death, to such contributorily negligent person or persons, and such contributorily negligent person or persons shall not share in any amount recovered in such action."

70 Ill.Rev.Stat. §2.1

"In the event that the only asset of the deceased estate is a cause of action arising under this Act, and no petition for letters of office for his or her estate has been filed, the court, upon motion of any person who would be entitled to a recovery under this Act, and after such notice to the party's heirs, legatees or devisees as the court directs, and without opening of an estate, may appoint a special administrator for the deceased party for the purpose of prosecuting or defending the action.

"If a judgment is entered or the action is settled in favor of the special administrator, he or she shall distribute the proceeds as provided by law, except that if proceeds in excess of $1,000 are distributable to a minor or person under legal disability, the court shall allow disbursements and fees to the special administrator and his or her attorney and the balance shall be administered and distributed under the supervision of the probate division of the court if the circuit court has a probate division."

110½ Ill.Rev.Stat. §9.1

"Who may act as administrator. A person who has attained the age of 18 years and is a resident of this State, is not

of unsound mind, is not an adjudged disabled person as defined in this Act and has not been convicted of a crime rendering him infamous is qualified to act as administrator."

110½ Ill.Rev.Stat. §22-3

"Right to sue. If no letters are issued in this State upon the estate of a nonresident decedent or ward, a representative to whom letters are issued on the estate by a court of competent jurisdiction of any other state, territory, country or the District of Columbia may sue in this State in any case in which a resident representative may sue. The court in which the suit is filed may order the nonresident representative to give bond for costs as in case of other nonresidents."

Fed.R.Civ.P. 4(a)(1)

"In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted."

Fed.R.Civ.P. 4(a)(5)

"The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the

expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

28 U.S.C. §1332(a)(1)

"Diversity of citizenship; amount in controversy; costs

(a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

28 U.S.C. §1359

"A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court. June 25, 1948 c. 646, 62 Stat. 935

Fed.R.Civ.P. 17(a)

"Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit

of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action has been commenced in the name of the real party in interest."

Fed.R.Civ.P. 82

"These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§1391-93."

1853 Illinois Laws 97

"The amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the jury may give damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death." 1853 Illinois Laws 97; Ill.Rev.Stat. 1953, Ch. 70, par. 2.

IN THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
CARTHAGE, HANCOCK COUNTY, ILLINOIS

No.

JEFFREY R. HAMMEL, as Special Administrator of the Estate of LACEY M. HAMMEL, deceased minor,

Plaintiff,

vs.

CHARLES F. EDDINGFIELD, M.D., EDWARD McKENNEY, D. O., and VASANT F. PAWAR, M.D.,

Defendants.

ORDER

THIS CAUSE coming on for hearing on behalf of the Petitioner, JEFFREY R. HAMMEL, it is hereby ordered that JEFFREY R. HAMMEL be appointed as a Special Administrator of the Estate of LACEY M. HAMMEL, pursuant to *Illinois Revised Statutes,* Chapter 70, Section 2.1

ENTERED: August 17, 1984

JUDGE: _____